PUBLIC UTILITIES COMMISSION
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TO: PARTIES OF RECORD IN CASE 05-05-030

This is the draft decision of Administrative Law Judge (ALJ) Bushey. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure," accessible on the Commission's website at http://www.cpuc.ca.gov. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages.

Comments must be filed with the Commission's Docket Office. Comments should be served on parties to this proceeding in accordance with Rules 2.3 and 2.3.1. Electronic copies of comments should be sent to ALJ Bushey at mab@cpuc.ca.gov. All parties must serve hard copies on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail or other expeditious methods of service. The current service list for this proceeding is available on the Commission's website, www.cpuc.ca.gov.

/S/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:avs

Attachment

Decision **DRAFT DECISION OF ALJ BUSHEY (Mailed 6/15/2006)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Qwest Communications Corporation and Qwest !nterprise America, Inc. Complainants, vs. Pacific Bell Telephone Company, dba SBC California, Defendants.	Case 05-05-030 (Filed May 31, 2005)

INTERIM ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Summary

This decision finds that the defendant's practice of imposing different yet-to-be-approved interim rates for cageless collocation service based solely on the date such service was ordered is unreasonable and unlawful as applied to the complainants, and orders refunds to the complainants. Other similarly situated competitive local carriers (if any) are given an opportunity to request similar refunds.

Background

Qwest Communications Corporation and Qwest !nterprise America, Inc., (collectively, complainants) are telecommunications carriers authorized by this

Commission to provide competitive local exchange service in California.[1] They purchase collocation arrangements from SBC California, Inc., now doing business as AT&T. These arrangements allow complainants to place equipment on SBC's premises and to interconnect with SBC's facilities. The rates SBC charges complainants for a certain type of collocation - cageless collocation - are the subject of their complaint.

Specifically, complainants allege (and SBC does not deny) that SBC charges cageless collocation rates based on SBC's Accessibility Letter CLECC 99-200 for service ordered prior to March 15, 2000; these rates are higher than the currently applicable cageless collocation rates provided for in SBC's Accessibility Letter CLECC 00-054, as modified by Accessibility Letter CLECC 00-064. Complainants contend that they have been overcharged by about $10 million since 2000 due to SBC imposing the higher 1999 rates. Complainants further contend that this dual rate system contravenes §§ 451, 453, 532, and 709 of the Pub. Util. Code, and § 251(c)(6) of the federal Communications Act of 1934. Complainants seek a full accounting and refund of all amounts paid since 2000 in excess of the cageless collocation rates that would be due under Accessibility Letter CLECC 00-054 as modified by Accessibility Letter CLECC 00-064.

SBC answers that, consistent with this Commission's directives, it is charging complainants interim collocation rates, which are subject to true-up once the Commission sets final collocation rates. SBC explains that in 1999 the Federal Communication Commission (FCC) established rules for collocation

[1] Qwest !nterprise of America, Inc. is also authorized to provide nondominant interexchange service.

arrangements, and that SBC adopted interim rates for these arrangements in Accessibility Letter CLECC 99-200. The following year, 2000, this Commission decided that final collocation prices would be set in the Open Access and Network Architecture Development (OANAD) proceeding, Rulemaking 93-04-003/Investigation 93-04-002. Pending the final rates, SBC adopted another set of interim rates for cageless collocation. The newer set of interim rates is in Accessibility Letter CLECC 00-054, as modified by CLECC 00-064. At that time, the two sets of interim rates were expected to be superseded by final rates, with full true-up for past payments, within six months. The Commission, however, has not yet adopted the final rates.

Pending Motion and Negotiations

Complainants have moved for summary judgment, contending that there are no triable issues of material fact and that complainants are entitled to judgment as a matter of law. In opposition, SBC argues that complainants have failed to show that the first set of interim rates, which are subject to true-up, are discriminatory, and that final rates have not yet been set in the OANAD proceeding.

While this complaint has been pending, parties to the OANAD proceeding have been sporadically negotiating a settlement of collocation rates. On July 8, 2005, SBC moved in that proceeding for a Commission order setting final collocation prices. SBC noted that it had been operating under interim pricing arrangements since 1999. SBC stated that the instant complaint proceeding cannot be resolved until the Commission has adopted final collocation prices. The Commission has granted the parties several extensions of time for further negotiations in the OANAD proceeding, and has also set a Prehearing Conference for June 19, 2006, to determine a procedural schedule.

Discussion

This motion has been pending since last year, while the parties pursued settlement negotiations in the OANAD proceeding and discovery in this proceeding. Given the indeterminacy of the OANAD negotiations, this motion for summary judgment should be addressed.

The question for us in this complaint is not what the final cageless collocation rates should be; indeed, our resolution of the complaint is without prejudice to our determination of final rates in the OANAD proceeding. The question, rather, is whether SBC may reasonably charge different interim rates, never approved by the Commission, that result in significantly higher collocation costs to carriers, such as complainants, for cageless collocation services ordered prior to SBC's later set of interim rates. We conclude that SBC has unreasonably discriminated among its cageless collocation customers and should be required to refund to complainants the amount of charges collected in excess of the charges that would have been due under the later set of interim rates. We repeat that there will be a true-up of these charges after we adopt final cageless collocation rates.

Standard for Summary Judgment

The Commission has previously described the summary judgment process:

> Under the summary judgment procedure, the moving party has the burden of showing that there are no disputed facts by means of "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." The opposition to the motion must state which facts are still in dispute. The motion shall be granted if all the papers show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. If

> the parties' filings disclose the existence of a disputed issue of material fact, the motion must be denied.

Westcom Long Distance v. Pac Bell, 54 CPUC 2d 244, 249 (D.94-04-082)(1994).

As discussed below, there are no material disputed facts surrounding the cageless collocation rates charged by SBC, and complainants are entitled to judgment as a matter of law. Therefore, we conclude that Qwest has met the standard for summary judgment and we grant the motion. Our specific analysis of the facts and governing law follows.

Factual Analysis

SBC charges different nonrecurring charges and recurring rates for cageless collocation arrangements based on the date ordered. The nonrecurring charges for cageless collocation orders placed prior to March 15, 2000, are found in Accessibility Letter CLECC 99-200. The recurring rates for these orders are found in SBC's Advice Letter 20412, filed with the Commission on July 9, 1999, but never approved. In contrast, cageless collocation arrangements ordered after March 15, 2000, are subject to the nonrecurring charges and recurring rates provided in Accessibility Letter CLECC 00-054, as modified by Accessibility Letter 00-064.

There is a complex history of collocation pricing at this Commission and the FCC that explains the existence of the two sets of collocation rates. The first set of interim collocation rates resulted from SBC's compliance with the FCC's 1999 Advanced Services Order, which required SBC to make cageless collocation immediately available to competitive local carriers. This Commission subsequently determined that final collocation rates would be set using Consensus Costing Principles, so SBC adopted the second interim collocation

rates based on these principles. However, neither set of interim prices has been reviewed or approved by the FCC or this Commission.

All parties expected the Commission to adopt final collocation rates no later than September 2000, such that any inequities caused by the two-tier system would be short-lived and fully remedied by the true-up requirement. Unfortunately, the Commission was unable to meet the September 2000 target due to the press of other urgent business, including the disruptions caused by electricity deregulation. For much of the past year, the parties to the OANAD proceeding have been discussing a potential negotiated resolution of the collocation issue but, as noted earlier, the negotiations have not been successful.

In its answer, SBC explains that it keeps two sets of interim rates in place to avoid truing up one set of interim rates to another set that may be adjusted again when final prices were set by the Commission. SBC does not contend that the differing rate structures are justified based on costs or any other objective difference in providing cageless collocation arrangements. Rather, SBC's justification is no more than an apparently accurate explanation of the historical facts that resulted in different interim rates based on the date of ordering the service.

For Qwest, however, paying the original interim rate for over six years has real world business consequences. Recall that complainants are <u>competitive</u> local exchange carriers. For complainants to have to pay higher interim rates for the same collocation services during the same periods, as compared to the interim rates paid by carriers ordering those services later than complainants, puts the complainants at a substantial and unfair competitive disadvantage. Apart from the anti-competitive impact, depriving any business of $10 million imposes harms. Cash flow is impaired; opportunities are foregone. These harms

cannot be fully mitigated by the promise of an indefinite "true up" at some point in the future.[2] In fact, the record shows that at least two competitive local carriers have negotiated away their true-up right to obtain immediate interim rate relief, *i.e.,* pre-2000 collocation arrangements moved to the lower, post-2000 interim rates.

To summarize, by continuing to charge complainants the old, higher interim rates while charging new lower interim rates to collocation customers ordering the service later than the effective date of the new rates, SBC harms complainants competitively and otherwise. We must next determine whether these harms are unlawful.

Legal Analysis

In California, all public utilities, including SBC, must furnish adequate and efficient service at just and reasonable rates to all customers, and may not grant a preference or advantage to any customer. These concepts are found in Article 12 of the California Constitution, and Legislature has expanded on and adapted these concepts in the Public Utilities Code, which has governed public utility service in California since 1909.

Specifically, Pub. Util. Code §451 requires that all charges be just and reasonable:

> All charges demanded or received by any public utility . . . for any product . . . or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

[2] We note that this Commission lacks the power to award consequential damages.

Even-handed treatment of customers is required by Pub. Util. §453. However, this section also recognizes that differences in customers may justify different rates, and only "unreasonable" rate discrimination is prohibited:

> (a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.
>
> . . .
>
> (c) No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect either as between localities or as between classes of service.

No party directed us to Commission precedent addressing the requirements of the Public Utilities Code where two or more tariff schedules may apply to substantially similar service. On our own initiative, we have located a Commission decision addressing the requirements of Pub. Util. Code §453 in the analogous context of closing an existing tariff schedule to new customers, and requiring the new customers to take service under a less favorable tariff schedule:

> Whenever two similarly situated customers are provided different services or rates, an issue of discrimination arises. PU Code §453(c) provides that, "No public utility shall establish or maintain any unreasonable difference as to rates, charges, facilities, or in any other respect, either as between localities or as between classes of services." For purposes of this discussion, the nondiscrimination provisions of §453(c) require us to consider whether there is a reasonable basis for treating additional customers differently from customers currently

> served under a particular schedule and who are otherwise similarly situated.
>
> We conclude that there is no reasonable basis for treating these customers differently. . . .
>
> We conclude that all customers should be able to choose from schedules that contain the rate levels and that offer substantially the same quality and value of service that were available to similarly situated customers on July 10, 1996.

Re Pacific Gas and Electric Company, 77 CPUC 2d 171, 186 (D.97-12-044).

As discussed above in the Factual Analysis section, there is no dispute that on March 15, 2000, SBC adopted new, lower interim rates for cageless collocation which it applied only to orders received after that date. These new, lower interim rates were not applicable to pre-March 15, 2000, orders for cageless collocation service. As a result, some of SBC's cageless collocation customers are paying a much higher rate than other customers for the same service.

Consistent with the statute and the above decision, we required to determine whether SBC has presented us with a reasonable basis for its two sets of interim cageless collocation rates. SBC has not submitted a cost study or any other form of cost-based justification for the different interim cageless collocation rates based on the date such service was ordered. SBC points to the history of this price differential and the forthcoming true-up as justification for the reasonableness of these two different rates. As discussed above, however, a future true-up does not fully mitigate the competitive and business harm caused by disparate rates. The history of cageless collocation rates similarly does not justify the different pricing of substantially similar cageless collocation arrangements.

Therefore, we conclude that SBC has not shown the difference in its cageless collocation rates based on ordering date is reasonable. Unreasonable rates are prohibited by §451. Unreasonable rate differences are also discriminatory, and violate Pub. Util. Code § 453.

Setting final collocation rates is well beyond the scope of this proceeding. However, moving Qwest and other similarly situated carriers to the more recent and lower interim collocation rates would at least subject all competitive local carriers to the same pricing for cageless collocation. This solution will remain interim and subject to true-up to the final collocation rates approved by the Commission.

We conclude that Qwest has met the standard for summary judgment by demonstrating that there are no disputed issues of material fact and that it is entitled to judgment as a matter law. We, therefore, grant Qwest's request for summary judgment. SBC shall prepare a full accounting of all cageless collocation payments received from Qwest and tabulate the difference between the nonrecurring charges and recurring rates imposed on Qwest since 2000 for cageless collocation arrangements and the collocation rates and charges provided in Accessible Letter 00-054, as modified by Accessible Letter 00-064. SBC shall refund this amount, including interest calculated at the 90-day commercial paper rate, to Qwest no later than 20 days after the effective date of this order.

Other Competitive Local Carriers and Cageless Collocation Rates

SBC shall serve a copy of this order on all competitive local carriers that are subject to the 1999 cageless collocation rates. No later than 30 days after service of this order, each such carrier may seek similar treatment for its cageless collocation arrangements by filing and serving a request in this docket. SBC

shall have 30 days to respond to any requests. The Commission will then evaluate the requests and responses, and issue an order resolving the requests.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

Assignment of Proceeding

John Bohn is the Assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

Findings of Fact

1. Since 2000, SBC has charged different interim rates for cageless collocation based on the date that the arrangement was ordered.

2. Both sets of rates are interim and subject to true-up to the final cageless collocation rates set by the Commission.

3. The post-March 15, 2000, interim cageless collocation rates are lower than pre-March 15, 2000, interim rates.

4. It is undisputed that complainants have incurred millions of dollars in higher rates for cageless collocation arrangements order pre-March 15, 2000.

5. Cageless collocation arrangements ordered before March 15, 2000, do not impose greater costs on SBC than later-ordered cageless collocation.

6. The Commission has neither reviewed nor approved either set of cageless collocation interim rates.

7. As of early 2000, the Commission expected to adopt final collocation rates by September of that year; however, the Commission has yet to adopt final rates.

8. No party disputes any fact necessary to resolve complainants' motion for summary judgment.

Conclusions of Law

1. To be granted summary judgment in its favor, a party must demonstrate that there are no disputed facts and that the moving party is entitled to judgment as a matter of law.

2. No party disputes that SBC charges two different sets of interim cageless collocation rates based on the date ordered.

3. SBC provided no reasonable basis for charging different cageless collocation rates to similarly situated customers based on date the arrangement was ordered.

4. Charging different rates to similarly situated customers violates Pub. Util. Code § 453, and is unreasonable in violation of Pub. Util. Code § 451.

5. Eventual true-up does not fully mitigate the impact of higher interim rates.

6. No hearings are necessary.

O R D E R

Therefore, **IT IS ORDERED** that:

1. Pacific Bell Telephone Company, doing business as SBC California (SBC), shall prepare an accounting of all cageless collocation arrangements where Qwest Communications Corporation and Qwest !nterprise America, Inc., (collectively Qwest) have paid the pre-March 15, 2000, cageless collocation rates. The accounting shall tabulate the differences between the amount paid and the post-March 15, 2000, rates. SBC shall refund the resulting amount, plus interest at the 90-day commercial paper rate, to Qwest within 20 days after the effective date of this order.

2. SBC shall serve this decision on all competitive local carriers that are subject to pre-March 15, 2000, cageless collocation rates. No later than 30 days

after such service, the carrier (s) may file and serve a request in this docket for similar treatment to that set out in Ordering Paragraph 1. SBC will have 30 days to file and serve a response.

3. No hearings are necessary in this proceeding. Case 05-05-030 shall remain open to resolve any requests received pursuant to Ordering Paragraph 2.

This order is effective today.

Dated _____, at San Francisco, California.

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a copy of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the copy of the filed document is current as of today's date.

Dated June 15, 2006, at San Francisco, California.

/S/ ANTONINA V. SWANSEN
Antonina V. Swansen

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